NO. 46734-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SPENCER GRANT, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Garold E. Johnson

No. 13-1-00530-3

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion by denying defendant's requests to proceed pro se when they were equivocal, untimely, or involuntary?

2. Does defendant incorrectly contend the written exercise of peremptory challenges in open court violates the public trial right when the Washington Supreme Court already confirmed the constitutionality of that practice in ***State v. Love***?

3. Has defendant failed to prove his counsel was ineffective for choosing not to object to the relevant description of the community supervision that uncovered evidence of defendant's failure to register as a sex offender because it was a presumptively tactical decision and was later addressed with limiting instructions?

B. STATEMENT OF THE CASE.

1. Procedure

Spencer Grant (hereinafter "defendant") was charged by the Pierce County Prosecuting Attorney's Office with failure to register as a sex offender and bail jumping. CP 28–29. Prior to trial, defendant moved to

proceed pro se. (07/01/14)RP 3.[1] The court denied this motion without prejudice, making clear that defendant could raise the motion again. (07/01/14)RP 14. Defendant explicitly declined to renew his motion to proceed pro se at the next hearing when given the opportunity. (08/05/14)RP 2. Defendant renewed his motion to proceed pro se on the morning of trial. (08/19/14)RP 5. The motion was again denied because it was untimely and defendant's decision appeared to be unduly influenced by his wife. (08/19/14)RP 16–17. Throughout this time, defendant's wife filed numerous motions on the defendant's behalf. (08/19/14)RP 3, 1RP 17.

The case proceeded to voir dire, and the parties conducted peremptory challenges in writing by passing a peremptory challenge sheet back and forth. (08/20/14)RP 53. Defendant exercised all six of his peremptory challenges. CP 236. The peremptory challenge sheet was subsequently filed with the court. CP 236.

The State called several witnesses. The Department of Corrections (DOC) officer who supervised defendant characterized defendant as a "highly violent offender" in passing to describe the reason he was required to make regular compliance checks that revealed defendant's failure to register. 3 RP 169. Defendant did not object; a jury instruction, however, was given to limit evidence of defendant's sex offense history. CP 67. That

[1] The pre-trial verbatim report of proceedings will be referred to by date, RP, and page number. (xx/xx/xx)RP #. The trial verbatim report of proceedings will be referred to by volume, RP, and page number. #RP #. The sentencing verbatim report of proceedings will be referred to by sentencing, RP, and page number. (Sentencing)RP #.

instruction was combined with others directed at the integrity of the deliberative process. CP 55.

The jury found defendant guilty as charged. 5RP 333. Defendant was sentenced to the low end of the standard range; he was sentenced to 43 months on Count I, and 51 months on Count II. (Sentencing)RP 357. Defendant filed this timely appeal. CP 197.

2. Facts

In 1994, defendant was convicted of Rape in the third degree—which triggered a duty to register as a sex offender. 3RP 118–119. Defendant subsequently was convicted of failure to register as a sex offender three times—once in 2001 and twice in 2011. 3RP 120–123; Ex 2–4. A full registration packet completed for—and signed by—defendant on September 21, 2012 listed his self-reported address as 4410 East K Street in Tacoma, WA. 3RP 152–153; Ex. 13. Defendant did not register, update his address, or attempt to contact the sex offender registration unit between September 21, 2012 and November 27, 2012. 3RP 157–158.

On November 27, 2012, Detective Jeff Turner conducted sex offender verification checks at the sex offender recovery home located at defendant's registered address. 2RP 77, 79, 63. Turner did not find defendant at that address. 2RP 81. Turner spoke with resident Daniel Beckham, who had been living at the home for about a month. 2RP 54.

When Turner showed Beckham defendant's picture, Beckham did not recognize defendant. 2RP 54. Beckham never saw defendant's name on the dry erase board—which had the name, DOC officer, and phone number for each person staying at the house. 2RP 54–55. Beckham could not identify defendant at trial. 2RP 53.

Maxwell Thompson was a resident of the home for approximately two and a half years, from 2011 to 2013. 2RP 63. Thompson verified defendant had lived at the home off-and-on for a couple of months. 2RP 64.[2] Thompson packed up his belongings and moved them into storage when defendant failed to return to the house. 2RP 65–66.

Defendant's community custody officer (CCO) Jonathan Casos had also attempted to contact defendant at the registered address. 3RP 171. First, Casos did not successfully make contact on October 25, 2012. 3RP 171. Then, Casos returned to the home on November 5, 2012 and was told defendant had moved away. 3RP 172. Casos did not hear from defendant at all between October 31 and November 27 of 2012. 3RP 173. Casos requested a warrant for defendant's arrest. 3RP 172.

According to defendant, he lived at the house starting September 21, 2012 and continuing about four months. 4RP 253. Defendant recalled that he stopped living in the house around January. 4RP 257. Defendant

[2] Thompson could not recall in what timeframe this occurred. 2RP 65.

admitted he knew he had a duty to register and to notify the sheriff if he moved. 4RP 270.

On February 18, 2014, defendant signed a scheduling order acknowledging he was to return to court on March 4, 2014. 3RP 209–210; Ex. 18. On March 4, 2014, Deputy Prosecuting Attorney Lloyd Oaks polled the gallery calling defendant's name at 1:20pm and 4:00pm, but defendant was not there. 3RP 214. Defendant allegedly missed the court date because he was with his ill mother. 4RP 258. Defendant acknowledged he knew there was a court date but did not show up to it. 4RP 269.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING DEFENDANT'S REQUEST TO PROCEED PRO SE BECAUSE DEFENDANT'S REQUESTS WERE EQUIVOCAL, UNTIMELY, OR INVOLUNTARY.

Criminal defendants have a constitutional right to self-representation. U.S. Const. amend. VI; Wash. Const. art. I, § 22. The right to proceed pro se is neither absolute nor self-executing. ***State v. Madsen***, 168 Wn.2d 496, 504 229 P.3d 714 (2010). Further, there is no right to "hybrid representation" through which defendants may serve as co-counsel with their attorneys. ***State v. DeWeese***, 117 Wn.2d 369, 379, 816 P.2d 1 (1991).

When a defendant moves to proceed pro se, the court must determine if the request is unequivocal and timely. *Id.* If unequivocal and timely, the court must then determine if the defendant's request is voluntary, knowingly, and intelligent. *Id.* (*citing* ***Faretta v. California***, 422 U.S. 806, 835, 95 S. Ct. 2525 (1975)). A colloquy on the record is the preferred means of determining whether a defendant understands the risks of self-representation. ***City of Bellevue v. Acrey***, 103 Wn.2d 203, 211, 691 P.2d 957 (1984).

Denials of requests for pro se status are reviewed under an abuse of discretion standard. *Id.* Discretion is abused if the decision is manifestly unreasonable, rests on facts unsupported by the record, or was made by applying the wrong legal standard. *Id.* To determine the validity of requests to proceed pro se, the trial court must examine the facts and circumstances and the entire record. ***State v. Thompson***, 169 Wn. App. 436, 465, 290 P.3d 996 (2012).

Because the right to proceed pro se necessarily waives the right to counsel, courts must apply a strong presumption against a defendant's effective waiver of his right to counsel. ***Madsen***, 168 Wn.2d at 504; ***In re Det. of Turay***, 139 Wn.2d 478, 420 n.13, 986 P.2d 790 (1999) (citing ***Brewer v. Williams***, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977)); ***State v. Thompson***, 169 Wn. App. at 465. "If the court has doubt relating to the ability of the defendant to make a knowing and intelligent

waiver of counsel, that doubt should be resolved by appointing counsel to represent the defendant[.]" ***State v. Chavis***, 31 Wn. App. 784, 792–793, 644 P.2d 1202 (1982).

a. July 1, 2014 Hearing: defendant made an equivocal request.

Defendant first moved to proceed pro se at a hearing before Judge Thomas Felnagle on July 1, 2014. (07/01/14)RP 3.[3] After the judge explained that defendant would be held to the same standards as an attorney, defendant admitted, "I do need help. I am not saying that I don't need help." (07/01/14)RP 7. Defendant further said, "Well, yeah, it's better to have counsel because I don't – I have to have trust in him[.]" (07/01/14)RP 9. When the judge stated he believed defendant was making a bad choice, defendant agreed, "It is a bad choice, and I made a lot of bad choices in my life[.]" (07/01/14)RP 11.

The judge denied defendant's motion without prejudice, reminding defendant he could raise it again. (07/01/14)RP 14. As defense counsel explained at a later hearing, "The Court ruled that [defendant] was not unequivocal in his request. There was certainly some doubt on his part." (08/19/14)RP 4.

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[3] Defense counsel explained defendant's motion to proceed pro se arose from counsel's refusal to communicate further with defendant's wife, who had been disruptive in defense counsel's office and filed many "motions" on defendant's behalf. (07/01/14)RP 4. During his colloquy with the judge, defendant paused to address his wife in the gallery; "Stop, please. Stop. They are gonna kick you out if you don't stop, please." (07/01/14)RP 11. These interactions with defendant's wife were part of the overall context of the judge's decision at the August 19, 2014 hearing discussed below.

"The request to be pro se must be unequivocal in the context of the record as a whole." ***State v. Stenson***, 132 Wn.2d 668, 741–742, 940 P.2d 1239 (1997) (citing ***State v. Luvene***, 127 Wn.2d 690, 698–699, 903 P.2d 960 (1995)). Black's Law Dictionary defines "unequivocal" as, "Unambiguous; clear; free from uncertainty." BLACK'S LAW DICTIONARY, 1563 (8th ed. 1999). Defendant's statements that he wanted to proceed pro se were intermingled with statements admitting he needed help, it would be better with an attorney, and going pro se was a bad choice. These mixed statements provided an adequate reason for the judge to find defendant's request was not unequivocal, as required to allow a defendant to proceed pro se.

Defendant relies on ***State v Breedlove***, 79 Wn. App. 101, 900 P.2d 586 (1995), to support the contention that his motion was unequivocal. Br. of App. p. 17. In ***Breedlove***, however, the defendant did not make the contradictory and ambiguous statements defendant in the present case did. The defendant in ***Breedlove*** unambiguously told the trial court he wanted to handle his own defense. 79 Wn. App. at 105. Nothing in the opinion suggests the defendant's statement, "I would ask that I be able to handle my own defense," was accompanied by statements such as "I do need help," "it is better to have counsel," and "this is a bad choice." Therefore, although the request to proceed pro se was unequivocal in ***Breedlove***, it is distinguishable from the present case.

The other case relied upon by defendant, ***State v. Vermillion***, 112 Wn. App. 844, 51 P.3d 188 (2002), presents a similar fact pattern and analysis as ***Breedlove***. The defendant in ***Vermillion*** also made unequivocal statements, which were not accompanied by the ambiguous statements made by defendant in the present case. *Id.* at 852–856. Therefore, that case too is distinguishable. Based on defendant's equivocal statements, the judge did not abuse his discretion by denying defendant's motion to proceed pro se.

b. August 5, 2014 Hearing: defendant did not wish to renew his motion.

At a hearing on August 5, 2014, defense counsel said, "I spoke with [defendant]. At this time he does not wish to renew his motion in regards to pro se." (08/05/14)RP 2. Defendant explicitly declined the opportunity to renew his motion to proceed pro se.

c. August 19, 2014 Hearing: defendant's request was involuntary and untimely.

Defendant moved before Judge Frank Cuthbertson to proceed pro se on August 19, 2014. (08/19/14)RP 5. At the beginning of the hearing, the State made a record that, "The defendant's wife has been fueling [sic] numerous motions on the defendant's behalf. They are in LINX. They've been going on for quite some time. . . . [the State is] not going to respond to them, as they have been filed by Defendant's wife." (08/19/14)RP 3. During the colloquy between the judge and defendant, the judge stopped to address

a female in the gallery, telling her, "You need to sit down." (08/19/14)RP 10.

Then, the following conversation about the influence of defendant's wife took place:

> THE COURT: Is this the trained lawyer who's giving you all this advice?
> THE DEFENDANT: No, that's my wife out there.
> THE COURT: Who's filing the motions, doing all this other stuff.
> THE DEFENDANT: She's doing what she believes. She knows the same thing I know, that I'm innocent of this crime. She's doing whatever she thinks she can.
> THE COURT: So she thinks you need to get rid of [defense counsel].
> THE DEFENDANT: I don't think I need to get rid of [defense counsel], but I want to represent myself.
> THE COURT: You don't want to get rid of [defense counsel].
> THE DEFENDANT: No, I don't want him representing me. I said I don't want to have to. Let me restate what I'm saying, that I do want to represent myself, Your Honor. I just don't want him mad at me.
> THE COURT: I guess my question is: Is this your wife's ideas [sic]?
> THE DEFENDANT: No, this is mine.
> THE COURT: Can I finish? Is this your wife's idea that you should represent yourself?
> THE DEFENDANT: No, it's mine.
> THE COURT: Okay. Whose idea is it for her to file these motions?
> THE DEFENDANT: Some of them were hers. Most of them were hers.

(08/19/14)RP 14–16. Ultimately, the judge denied defendant's motion, finding it involuntary. (08/19/14)RP 16. The judge explained, "I think

you've been unduly influenced by your spouse on these things, and I'm going to deny the motion." (08/19/14)RP 16. As previously discussed, defendant's wife had interrupted earlier proceedings as well, at one point requiring defendant to stop his colloquy with the judge in order to address her in the gallery. (07/01/14)RP 11.

The judge further found defendant's motion was not timely because it was made on the morning of trial. (08/19/14)RP 16–17. The judge reiterated:

> I don't believe this is a knowing and voluntary request on your part. I think you've been unduly influenced by other people in this matter. I don't believe the motion is timely, and I don't believe it's a knowing, intelligent and voluntary waiver of your right to counsel.

(08/19/14)RP 17.

First, the trial court did not abuse its discretion in denying defendant's motion to proceed pro se on the basis that it was untimely. To be timely, a motion to proceed pro se should be made a reasonable time before trial. ***State v. Fritz***, 21 Wn. App. 354, 361, 585 P.2d 173 (1978). "If the request is made shortly before or as the trial is to begin, the existence of the right depends on the facts with a measure of discretion in the trial court." ***State v. Garcia***, 92 Wn.2d 647, 656, 600 P.2d 1010 (1979) (citing ***Fritz***, 21 Wn. App. at 361).

In the present case, defendant's motion on August 19, 2014 was made on the morning the case was set for trial. (08/19/14)RP 16–17. After

defendant's explicit refusal to renew his motion to proceed pro se at the August 5, 2014 hearing, this new motion on the morning of trial was not timely. Further, looking at the record as a whole, the trial had already been delayed several times. Defendant had already complained in that particular hearing about his right to a speedy trial. (08/19/14)RP 7. At a previous hearing, a continuance was granted because no courtrooms were available, and defendant objected to the trial date being moved. (08/05/14)RP 2–3. At another hearing, it was noted that defendant was not in favor of the continuance or the continuing hindrance on his liberty interests. (08/07/14)RP 3. Looking at the record as a whole, the trial court did not abuse its discretion by finding the motion was untimely when it was made the morning of trial on a case that had already been significantly delayed.

Second, the trial court did not abuse its discretion in denying defendant's motion to proceed pro se on the basis that the waiver was involuntary. Appellate courts should not second guess a fact-finder's credibility determination. ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). In the present case, the trial court found defendant's wife—through her numerous filings in LINX and her disruptive behavior in the courtroom—unduly influenced defendant's decision to move to proceed pro

se.[4] The trial court was at one point so interrupted by defendant's wife's conduct, he had to stop his colloquy with defendant to address the wife. (08/19/14)RP 10. The trial court was further able to witness defendant's assertions that it was his idea to proceed pro se, not his wife's, first-hand to assess the credibility of such assertions. The trial court did not find defendant's assertions credible. The trial court was in the best position to witness defendant and assess his credibility during colloquy, as well as witness the actions of defendant's wife in the gallery and the effect those actions had on defendant.

Considering the strong presumption against the waiver of counsel, the trial court did not abuse its discretion by finding defendant's request to proceed pro se was not voluntary, knowing, and intelligent. Any doubt as to whether the defendant made a voluntary, knowing, and intelligent waiver of counsel should be resolved in favor of appointing counsel. ***Chavis***, 31 Wn. App. at 792–793. Defendant has failed to prove the trial court abused its discretion by finding his motion to proceed pro se both untimely and involuntary.

[4] In cases where a court must assess the validity of a defendant's waiver of counsel, actions in the courtroom may speak louder than words. *See*, ***DeWeese***, 117 Wn.2d at 379 ("What the defendant cannot obtain because of a lack of a valid reason, that defendant should not be able to obtain through disruption of trial or a refusal to participate. A defendant may not manipulate the right to counsel for the purpose of delaying and disrupting trial."); ***United States v. Thomas***, 357 F.3d 357, 362 (3d Cir. 2004) ("A defendant may lose his or her right to counsel through forfeiture or waiver [by conduct].").

2. THE WASHINGTON SUPREME COURT HAS MADE CLEAR THAT CONDUCTING PEREMPTORY CHALLENGES ON A PIECE OF PAPER EXCHANGED IN OPEN COURT DOES NOT VIOLATE A DEFENDANT'S RIGHT TO A PUBLIC TRIAL.

In ***State v. Love***, the Washington Supreme Court held that written peremptory challenges are consistent with the public trial right so long as they are filed in the public record. ***State v. Love***, __ Wn.2d __, __ P.3d __ (2015) (No. 89619-4, filed July 15, 2015).[5] The State and defense counsel are free to exercise peremptory challenges by exchanging a sheet in open court when the peremptory challenge sheet is subsequently filed in the public record of the case.

The accused in a criminal prosecution has a right to a speedy public trial. Wash. Const. art. I, § 22. Relatedly, the constitution provides, "[j]ustice in all cases shall be administered openly, and without unnecessary delay." Wash. Const. art. I, § 10. There is a three-step framework which guides analysis in public trial cases: (1) if the public trial right attaches to the proceeding at issue; (2) if the right attaches, if the courtroom was closed; (3) if closed, if the closure was justified. ***Love***, slip op. at 6 (citing ***State v. Smith***, 181 Wn.2d 508, 513–514, 334 P.3d 1049 (2014)). The proceeding challenged by defendant is the exercising of peremptory challenges in writing between the parties. Br. of App. p. 1. Defendant did not object to this procedure below. (8/20/14)RP 53.

[5] The slip opinion for ***State v. Love*** is attached as Appendix A. All subsequent citations will cite to the page number of the slip opinion (***Love***, slip op. at #).

The first inquiry is whether the public trial right attaches to the proceeding at issue. To answer this question, courts apply the "experience and logic" test. ***State v. Sublett***, 176 Wn.2d 58, 72, 292 P.3d 715 (2012). The "experience" prong asks "whether the place and proves have historically been open to the press and general public." *Id.* at 73 (quoting ***Press-Enterprise Co. v. Superior Court***, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)). The "logic" prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* Both the experience and logic prongs must be met to implicate the public trial right. ***Sublett***, 176 Wn.2d at 73.

The public trial right attaches to jury selection. The Supreme Court recently said, it is "well settled that the right to a public trial . . . extends to jury selection." ***Love,*** slip op. at 7 (quoting ***State v. Brightman***, 155 Wn.2d 506, 515, 122 P.3d 150 (2005)). The Court reasoned that "for cause and peremptory challenges can raise questions about a juror's neutrality and a party's motivation for excusing the juror that implicate the core purpose of the right, and questioning jurors in open court is critical to protect that right." ***Love***, slip op. at 7. Therefore, the public trial attaches to the proceeding at issue.

The second inquiry—after determining the public trial right has attached—is whether there was a courtroom closure. There are two general types of courtroom closures. The first occurs "when the courtroom is

completely and purposefully closed to spectators so that no one may enter and no one may leave." ***Love***, slip op. at 7 (quoting ***State v. Lormor***, 172 Wn.2d 85, 93, 257 P.3d 625 (2011)). The second is "where a portion of a trial is held someplace 'inaccessible' to spectators, usually in chambers." ***Love***, slip op. at 8 (citing ***Lormor***, 172 Wn.2d at 93). The second type of closure is what defendant alleges occurred in the present case. Br. of App. p. 35.

This is where defendant's argument fails. As the Supreme Court recently held in ***Love***, "written peremptory challenges are consistent with the public trial right so long as they are filed in the public record." ***Love***, slip op. at 9. "[L]egitimate methods of challenging jurors in writing . . . *do not amount to a courtroom closure* because they are made in open court, on the record, and subject to public scrutiny." ***Love***, slip op. at 9 (emphasis added). The Supreme Court rejected the assertion that exercising peremptory challenges in writing in open court violates a defendant's right to a public trial.

In the present case, during voir dire, the trial court explained in open court:

> [T]hey have the right to exercise peremptory challenges just to be sure that the parties feel that they're getting a fair trial. It's not just truly fair but also a perception of fairness on their parts as well.
> They're going to exercise their preemptions. And the way they do that is the state goes first and they exercise theirs and they hand a piece of paper back over to [defense counsel]

> and he exercises them, back and forth. . . .
> While we're doing that, it works best to sit patiently and just kind of wait for them.

(8/20/14)RP 53. The prospective jurors remained in the courtroom during this time while the judge answered various questions for them about the judicial process. (8/20/14)RP 53–65. There is nothing in the record to suggest the courtroom was locked or the public was not granted access during this time.

The process used in the present case is very similar to the process approved in ***Love***. The Court described how the parties exercised peremptory challenges:

> The record reflects that counsel exercised peremptory challenges silently in the courtroom by exchanging a written list of jurors between themselves. Counsel alternated striking one name from the list (the struck juror sheet), indicating they had exercised a peremptory challenge and removed the juror, until each side had exhausted its challenges. The struck juror sheet, which was filed in the court record and available to the public, shows Love waived him peremptory challenges and the State challenged juror 4. There is no indication that spectators (prospective jurors included) were forced to leave the courtroom, that the courtroom was locked, or that anyone was prohibited from entering. Instead, the courtroom remained open while counsel exercised their peremptory challenges, in the same manner as it was during the discussion of the for cause challenges. The record does not reflect that observers were unable to see counsel exchanging the struck juror sheet.

Love, slip op. at 4 (footnote omitted). The only apparent differences between the present case and ***Love*** are, in the present case, the judge

explained the peremptory process out loud, on the record to the prospective jurors, and defendant exercised all six of his peremptory challenges. (8/20/14)RP 53; CP 236. Therefore, under ***Love***, there was no violation of defendant's right to a public trial because the peremptory challenges were completed in writing.

3. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR CHOOSING TO NOT OBJECT TO A STATEMENT THAT WAS RELEVANT TO THE CRIME CHARGED BECAUSE THE EVIDENCE WAS PROBATIVE AND THE CHOICE TO NOT OBJECT IS A LEGITIMATE TRIAL TACTIC. FURTHER, DEFENDANT HAS FAILED TO PROVE HE WAS PREJUDICED BY THIS CHOICE NOT TO OBJECT.

To demonstrate ineffective assistance of counsel, a defendant must show two things: (1) defense counsel's representation fell below an objective standard of reasonableness in light of all circumstances, and (2) defense counsel's representation prejudiced the defendant. ***State v. McFarland***, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); ***State v. Thomas***, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987) (applying the two-prong test in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

The burden is on the defendant alleging ineffective assistance to show deficient representation based on the record below. ***McFarland***, 127 Wn.2d at 335. There is a strong presumption that counsel's representation was effective. *Id.*; ***State v. Brett***, 162 Wn.2d 136, 198, 892 P.2d 29 (1995).

The failure of a defendant to show either deficient performance or prejudice defeats his claim. ***State v. Emery***, 174 Wn.2d 741, 755, 278 P.3d 653 (2012). Further, a claim for ineffective assistance of counsel fails if the actions of counsel go to the theory of the case or to legitimate trial tactics. ***McFarland***, 127 Wn.2d at 336 (*citing* ***State v. Garrett***, 124 Wn.2d 504, 519, 881 P.2d 185 (1994)).

Trial counsel's decision about whether to object is a classic example of trial tactics and only in egregious circumstances relating to evidence central to the State's case, will the failure to object constitute incompetent representation that justifies reversal. ***State v. Madison***, 53 Wn. App. 754, 763, 770 P.2d 662 *review denied*, 113 Wn.2d 1002, 777 P.2d 1050 (1989). Courts presume "the failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption." ***State v. Johnston***, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007). To prevail on a claim of ineffective assistance of counsel based on a failure to object, the defendant must show (1) "the absence of legitimate strategic or tactical reasons supporting the challenged conduct," (2) "an objection to the evidence would likely have been sustained, and (3) the result of the trial would have been different had the evidence not been admitted." ***State v. Saunders***, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). Defendant has not carried that burden here.

In his testimony, CCO Casos explained the level of defendant's supervision. 3RP 168–169. Casos explained, "[I]f I remember correctly, he's a highly violent offender classified under DOC; therefore, I have to do two home checks per month minimum, and also one collateral check, aside from the office check." 3RP 169. Casos continued by detailing his attempts to contact defendant at 4410 East K Street, where he purported to be living. 3RP 170. Defense counsel did not object to Casos's remark that defendant was a "highly violent offender." This choice by defense counsel did not render his performance deficient.

Casos's characterization of defendant as a "highly violent offender" was inextricably tied to the res gestae of why DOC so frequently checked defendant. This information was directly relevant to the credibility of Casos's testimony that the verification checks underlying defendant's charge were actually made. Casos's unsuccessful attempts to contact defendant at his registered address were critical evidence of defendant's failure to register, for they combined with the evidence of checks conducted by the Tacoma Police Department to refute an inference that infrequent checks led to a mistaken impression of a registration failure. The challenged comment explained the supervision level mandating those checks. Without the background information explaining the need for regular checks, the jury may have been more likely to question Casos's professed vigilance. Similar reasoning might have lead the jury to wrongly conclude Casos was

approximating, exaggerating, or otherwise mistaken about the several checks critical to supporting the charge. The relevance of defendant's level of supervision deterred defense counsel from drawing further attention to it through an objection uncertain to succeed.

Defense counsel's choice to not object can also be explained by legitimate tactical reasons, therefore the performance was not deficient. If defendant's level of supervision was as prejudicial as defendant now contends, *see* Br. of App. p. 37, objecting to this passing information provided by Casos could have highlighted it for the jury. As Division III explained in ***State v. Kloepper***, "[t]he decision to not object to or seek a cure for damaging evidence is a classic tactical decision." ***State v. Kloepper***, 179 Wn. App. 343, 356, 317 P.3d 1088 *review denied*, 180 Wn.2d 1017, 327 P.3d 55 (2014). The court further explained it is a tactical decision "not to highlight the evidence to the jury." *Id.* at 355. Further, "[i]t is not a basis for finding counsel ineffective." *Id.* Just as in ***Kloepper***, defense counsel did not err by choosing to not object to the passing remark made by Casos. Defendant has failed to rebut the presumption that defense counsel's decision to not object was a tactic decision. Failure to show deficient representation alone defeats defendant's claim.

Defendant has also not shown he was prejudiced by defense counsel's choice not to object. To show prejudice, defendant must show that, except for counsel's alleged errors, the result of the proceeding would have

been different. ***McFarland***, 127 Wn.2d at 335. Defendant has not made this showing. The jury received a limiting instruction specifically addressing defendant's sex offender history:

> Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of a prior conviction for a felony sex offense and prior convictions for Failure to Register as a Sex Offender and may be considered by you only for the purpose of proving the elements of the crimes charged. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 67. This instruction combined with the instruction on the elements of failure to register and the general instruction limiting the juror's decision on guilt to the facts proved and the law given:

> As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

CP 55. The jury is presumed to follow the court's instructions. ***Emery***, 174 Wn.2d at 766. These instructions did not permit any prejudice attending defendant's sex offender status or the various features of his supervision to bolster deficient proof of a registration failure. The instructions operated together to ensure the jury limited its consideration of all the facts surrounding the incident to the ultimate decision of whether the elements had been proved.

The fact of defendant's supervision status was the basis for the DOC compliance checks that revealed defendant's failure to register. That fact was res gestae of the case, as was defendant's temporary residence in the special home for sex offenders and his history of convictions for a felony sex offense and prior registration failures. The instructions as a whole made it clear that evidence of the custodial conditions and prior convictions attending defendant's status were only to be considered in the context of the charged registration failure, and not for any improper purpose.

The very nature of this case required the jurors to compartmentalize any bias held against sex offenders in order to act impartially to reach a proper verdict based on a rational evaluation of the evidence. To many, a registered sex offender on DOC supervision is synonymous to a "highly violent offender" as both are commonly believed to be people who should be monitored due to the potential risk they pose to the community. But juries called upon to decide these cases are nonetheless presumed to follow the instructions given and put aside any emotion or prejudice they hold.

Further, counsel's overall performance was effective. Counsel lodged many objections during pre-trial and trial. *See*, 1RP 22, 23, 24; 3RP 112, 175; 4RP 261, 261, 269; 5RP 322. There was also overwhelming evidence of defendant's guilt presented at trial. One resident of the house effectively placed defendant out of the house for two months during the charging period. 2RP 54. Another established defendant had lived there but

left and never returned to pick up his belongings. 2RP 65–66. Tacoma Police officers were unable to make contact with defendant at the house. 2 RP 179. Community custody officers were unable to make contact with defendant at the house. 3RP 171. Defendant has therefore failed to show prejudice under the unique facts of this case, and with it, ineffective assistance of counsel.

D. CONCLUSION.

The trial court did not abuse its discretion by denying defendant's motions to proceed pro se because they were equivocal, untimely, and involuntary. There was no violation of defendant's public trial right when the parties exercised peremptory challenges in writing by passing a peremptory challenge sheet back and forth in open court. Defendant has failed to prove defense counsel's choice not to object to probative evidence regarding defendant's level of supervision constituted deficient performance, and defendant has failed to show he was prejudiced by that choice.

The State respectfully requests this Court affirm defendant's convictions.

DATED: August 19, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

Jordan McCrite
Rule 9 Legal Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8-19-15 Theresa Vo
Date Signature

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	No. 89619-4
v.	)	En Banc
UNTERS LEWIS LOVE, Petitioner.	)	Filed JUL 16 2015

YU, J.—This case is another opportunity to clarify our evolving jurisprudence on open courts. Today we decide if a particular method of challenging jurors after voir dire—a method commonly employed in trial courts around the state—violates the constitutional right to a public trial. At the conclusion of voir dire questioning, counsel exercised for cause challenges orally at the bench and subsequently exercised peremptory challenges silently by exchanging a list of jurors and alternatively striking names from it. All of voir dire, including the juror challenges, occurred in open court, on the record, and in full view of any observer in the

courtroom. We hold the juror challenges in this case were exercised in a manner consistent with the minimum safeguards of the public trial right and affirm.

BACKGROUND

Petitioner Unters Lewis Love elected to go to trial on several counts of theft and bail jumping. The first day of trial was unremarkable from an open court perspective. Several preliminary matters consumed the morning, and the trial judge heard argument and ruled on these motions in open court and on the record. The jury pool was brought into the courtroom after lunch for jury selection. The trial judge placed the jury pool under oath and briefly explained the mechanics of jury selection, including the parties' right to challenge jurors.

Voir dire examination began immediately thereafter. Both the trial judge and counsel questioned the jury pool in open court; their questions and the potential jurors' responses were on the record. When questioning concluded, the trial judge asked counsel to approach the bench to discuss for cause challenges in the presence of the court reporter:

THE COURT:	Any for-cause challenges?
[DEFENSE]:	Fifteen.
THE COURT:	Fifteen? Any objection?
. . . .	
[STATE]:	I think that's—the state has no objection to No. 15 being struck for cause.
THE COURT:	Mm-hm. Any others?
[DEFENSE]:	Number 30.

THE COURT: Number 30?

[STATE]: Yeah. No objection.

Verbatim Report Proceedings (Apr. 9, 2012) at 132-33. Jurors 15 and 30 had strongly indicated they could not be impartial jurors in response to questions during voir dire, which occurred in the presence of Love, other potential jurors, and the public. The trial judge granted both of Love's for cause challenges. Though the discussion and ruling on these challenges occurred at the bench, the exchange was on the record and visible to observers in the courtroom. The record does not indicate if observers could hear what was said, but no one was asked to leave the courtroom.

Peremptory challenges followed. The record reflects that counsel exercised peremptory challenges silently in the courtroom by exchanging a written list of jurors between themselves. Counsel alternated striking one name from the list (the struck juror sheet), indicating they had exercised a peremptory challenge and removed the juror, until each side had exhausted its challenges.[1] The struck juror

[1] The method of exercising peremptory challenges on paper appears common in this state and is explicitly required in several counties. *See* COWLITZ COUNTY SUPER. CT. LOCAL CIV. R. 47(e)(9) ("The clerk shall keep a list of jurors passed for cause and when it is complete will provide the list to the attorneys for the parties who will, in turn, exercise challenges by striking the name of each challenged juror without oral comment."); FERRY\PEND OREILLE\STEVENS COUNTY SUPER. CT. LOCAL CIV. R. 47(e)(9) ("The exercise or waiver of peremptory challenges shall be noted silently."); GRANT COUNTY SUPER. CT. LOCAL CIV. R. 47(c) ("After examination of the panel, counsel will, in turn, exercise peremptory challenges by striking names from a roster of those panel members not previously dismissed."); HELLS CANYON CIRCUIT SUPER. CT. LOCAL CIV. R. 47(d)(6) ("When questioning by the court and counsel is completed, the Court will allow the private exercise of peremptory challenges by striking [the] name of the first exercised challenge from the panel of the first 12 jurors remaining after the entire panel has been passed for cause."); HELLS CANYON SUPER. CT. LOCAL CRIM. R. 6.3; KITTITAS COUNTY SUPER. CT. LOCAL CIV. R. 47

sheet, which was filed in the court record and available to the public, shows Love waived his peremptory challenges and the State challenged juror 4. There is no indication that spectators (prospective jurors included) were forced to leave the courtroom, that the courtroom was locked, or that anyone was prohibited from entering. Instead, the courtroom remained open while counsel exercised their peremptory challenges, in the same manner as it was during the discussion of the for cause challenges. The record does not reflect that observers were unable to see counsel exchanging the struck juror sheet.

The trial judge thereafter announced that a jury had been selected. In open court and on the record, the judge read the names of the first 14 jurors left on the struck juror sheet (excluding jurors 4 and 15) and empaneled 12 jurors and two alternates. The judge thanked and dismissed the remaining potential jurors—including jurors 4, 15, and 30—without further explanation. The empaneled jury convicted Love on all counts.

("Unless good cause is shown, all peremptory challenges shall be exercised in open Court at the side bar by marking the challenged juror's name on a form to be provided by the Court."); KLICKITAT\SKAMANIA SUPER. CT. LOCAL CIV. R. 9(VI)(A) ("In trial by jury cases, peremptory challenges shall be exercised secretly [by] mark[ing] and initial[ing] such challenge upon the sheet furnished for that purpose."); SPOKANE COUNTY SUPER. CT. LOCAL CIV. R. 47(e)(9) ("The exercise or waiver of peremptory challenges shall be noted secretly on the jury list."); YAKIMA COUNTY SUPER. CT. LOCAL CIV. R. 47(e)(1) ("All peremptory challenges allowed by law shall be exercised in writing. . . . The purpose of this rule is to preserve the secrecy of the peremptory challenge process and all parties and their counsel shall conduct themselves to that end."). Since we disapprove of secret proceedings, we assume that references to "secrecy" in these rules refer to exercising peremptory challenges silently on paper.

Love appeals his convictions, arguing that the method of jury selection in his case violated his right to a public trial. He maintains that exercising for cause challenges at the bench and peremptory challenges on the struck juror sheet effectively "closed" the courtroom, though it was unlocked and open, because the public was not privy to the challenges in real time. He also argues his right to be present at all critical stages of the trial was violated because he could not approach the bench with counsel to discuss the for cause challenges.

The Court of Appeals affirmed in an opinion that predates many of our recent public trial right cases. *State v. Love*, 176 Wn. App. 911, 309 P.3d 1209 (2013). We granted review to consider how our open courts jurisprudence affects how parties can exercise for cause and peremptory challenges at trial. *State v. Love*, 181 Wn.2d 1029, 340 P.3d 228 (2015).

ANALYSIS

Love's two claims are purely legal questions, so our review is de novo. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011); *State v. Strode*, 167 Wn.2d 222, 225, 217 P.3d 310 (2009).

A. PUBLIC TRIAL RIGHT CLAIM

We first consider Love's claim that potential jurors were challenged in a manner that violated his right to a public trial. A criminal defendant's right to a "speedy public trial" is found in article I, section 22 of the Washington Constitution,

one of two constitutional components of our open courts doctrine. Love's standing in this case flows from article I, section 22.[2] The other component to open courts, article I, section 10, guarantees the public that "[j]ustice in all cases shall be administered openly, and without unnecessarily delay." These related constitutional provisions "serve complementary and interdependent functions in assuring the fairness of our judicial system," *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995), and are often collectively called the "public trial right."

A three-step framework guides our analysis in public trial cases. First, we ask if the public trial right attaches to the proceeding at issue. Second, if the right attaches we ask if the courtroom was closed. And third, we ask if the closure was justified. *State v. Smith*, 181 Wn.2d 508, 513-14, 334 P.3d 1049 (2014) (citing *State v. Sublett*, 176 Wn.2d 58, 92, 292 P.3d 715 (2012) (Madsen, C.J., concurring)). The appellant carries the burden on the first two steps; the proponent of the closure carries the third. *See id.* at 516-17.

The State argues that Love's claim fails at the outset, urging us to hold that the public trial right does not attach to for cause or peremptory challenges. Typically experience and logic determine if the public trial right attaches to a particular court

[2] Whether a criminal defendant also has standing to assert the public's right under article I, section 10 is an open question that we need not address in this case. *See State v. Shearer*, 181 Wn.2d 564, 574, 334 P.3d 1078 (2014); *State v. Herron*, 177 Wn. App. 96, 318 P.3d 281 (2013), *review granted*, 182 Wn.2d 1001, 342 P.3d 326 (2015).

proceeding, though we can also rely on prior cases that have applied right to the proceeding at issue. *Sublett*, 176 Wn.2d at 73; *State v. Wise*, 176 Wn.2d 1, 12 n.4, 288 P.3d 1113 (2012) (noting it was "not necessary to engage in a complete 'experience and logic test,'" instead citing previous cases to support attachment). Our prior cases hold it "well settled that the right to a public trial . . . extends to jury selection," *State v. Brightman*, 155 Wn.2d 506, 515, 122 P.3d 150 (2005), and we reaffirm that the right attaches to jury selection, including for cause and peremptory challenges. Unlike administrative or hardship excusals, for cause and peremptory challenges can raise questions about a juror's neutrality and a party's motivation for excusing the juror that implicate the core purpose of the right, and questioning jurors in open court is critical to protect that right. Open and transparent questioning fosters public confidence in subsequent challenges to jurors and, ultimately, the composition of juries in criminal trials.

We nevertheless affirm Love's conviction because he has not shown a courtroom closure in this case, failing to carry his burden under the second prong of our analysis. We have reversed convictions for two types of closures. The first, obvious type of closure occurs "when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011); *see Brightman*, 155 Wn.2d at 511-12 (public excluded from courtroom during voir dire); *In re Pers. Restraint of Orange*,

152 Wn.2d 795, 801-02, 100 P.3d 291 (2004) (same). Love does not allege the courtroom was closed in this traditional way.

The second type of closure occurs where a portion of a trial is held someplace "inaccessible" to spectators, usually in chambers. *Lormor*, 172 Wn.2d at 93; *see also State v. Shearer*, 181 Wn.2d 564, 568, 334 P.3d 1078 (2014) (private questioning of juror in chambers); *Strode*, 167 Wn.2d at 227 (same of multiple jurors); *State v. Paumier*, 176 Wn.2d 29, 33, 288 P.3d 1126 (2012) (same). Love equates the for cause and peremptory challenges in his trial—which occurred in open court—to those exercised behind a closed chambers door. He argues the possibility that spectators at his trial could not hear the discussion about for cause challenges or see the struck juror sheet used for peremptory challenges rendered this portion of his trial inaccessible to the public.

We find no merit in that comparison. The public trial right facilitates fair and impartial trials through public scrutiny. *Shearer*, 181 Wn.2d at 566. The public's presence in the courtroom reminds those involved about the importance of their roles and holds them accountable for misconduct. *Id.*; *Strode*, 167 Wn.2d at 226. Effective public oversight of the fairness of a particular trial begins with assurance of the fairness of the particular jury.

Yet the public had ample opportunity to oversee the selection of Love's jury because no portion of the process was concealed from the public; no juror was

questioned in chambers. To the contrary, observers could watch the trial judge and counsel ask questions of potential jurors, listen to the answers to those questions, see counsel exercise challenges at the bench and on paper, and ultimately evaluate the empaneled jury. The transcript of the discussion about for cause challenges and the struck juror sheet showing the peremptory challenges are both publically available. The public was present for and could scrutinize the selection of Love's jury from start to finish, affording him the safeguards of the public trial right missing in cases where we found closures of jury section. *See Wise*, 176 Wn.2d at 7-8; *Paumier*, 176 Wn.2d at 33-34. We hold the procedures used at Love's trial comport with the minimum guarantees of the public trial right and find no closure here.

Although Love argues for a broad rule that all peremptory challenges must be spoken aloud, written peremptory challenges are consistent with the public trial right so long as they are filed in the public record. Spoken peremptory challenges certainly increase the transparency of jury selection, but there are still legitimate methods of challenging jurors in writing, like the practice here, that do not amount to a courtroom closure because they are made in open court, on the record, and subject to public scrutiny.

In summary, Love cannot show a closure occurred on these facts and his public trial claim fails.

B. RIGHT TO BE PRESENT CLAIM

Love next argues that his absence from the bench conference where the trial judge and counsel discussed and excused two jurors for cause violated his right to be present at critical stages of his trial.[3] Our state and federal constitutions protect the right of a criminal defendant to be present "at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987); *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994). This protection is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution; our state equivalent is article I, section 22, which, in addition to a "speedy public trial," also entitles defendants to "appear and defend in person."

Jury selection is a critical stage of a criminal trial under both the state and federal constitutions. *See Irby*, 170 Wn.2d at 884. But the record before us does not demonstrate a violation of Love's right to be present. Love was present in the courtroom during all of voir dire, including potential jurors' answers to questions that form the basis for challenges. Nothing suggests that Love could not consult

[3] The Court of Appeals declined to reach the merits of this error, finding it unpreserved and outside any of the circumstances in RAP 2.5(a). But the record shows that Love himself tried to object to his lawyer conducting the juror challenge process. Love asked the trial judge several times to approach the bench after his lawyer exercised the for cause challenges. This preserved the error.

with his attorney about which jurors to challenge or meaningfully participate in the process. *Cf. id.* (right to be present violated where portion of jury selection occurred between the court and counsel over e-mail, without consultation of jailed defendant). It is a long-standing rule that we do "'not, for the purpose of finding reversible error, presume the existence of facts as to which the record is silent.'" *Barker v. Weeks*, 182 Wash. 384, 391, 47 P.2d 1 (1935) (quoting 4 C.J. *Appeal and Error* § 2666 (1916)). Love's right to be present claim also fails.

CONCLUSION

Potential jurors at Love's trial were questioned and challenged in an open courtroom and on the record. This is all that the public trial right requires of jury selection. We hold on these facts that exercising for cause challenges at a bench conference and peremptory challenges on a written list do not constitute a closure. Love's convictions are affirmed.

WE CONCUR:

PIERCE COUNTY PROSECUTOR

August 20, 2015 - 4:00 PM

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